Supreme Court, U.S.
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No. 00-1872

In The

Supreme Court of the United States

ROY NESET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The United States dedicates a large portion of its opposition brief to the petition for writ of *certiorari* to arguing the merits of the case. *See* Opp. 1.a, 1.b, 1.c. However, it offers no persuasive reasons why the petition should not be granted.

The United States' argument against granting the petition rests primarily on the fact that this Court denied *certiorari* in the factually similar *United States v. Any and All Radio Station Transmission Equipment* (*Fried*), 207 F.3d 458 (8th Cir. 2000). This reliance is misguided, for it overlooks key differences between *Fried* and the instant case and fails to take into account developments that have occurred subsequent to the denial of *certiorari* in *Fried* which underline and exacerbate the split in federal authority in this area of the law.

1. While *Fried* and the instant case both involve a question of whether federal district courts have jurisdiction to consider the constitutionality of Federal Communications Commission (FCC) regulations as a defense to an FCC action, there is an important difference. In *Fried*, the FCC sought the in rem forfeiture of Mr. Fried's radio equipment. 207 F.3d at 459. In the instant case, the FCC went much further by seeking an injunction against petitioner to stop him from broadcasting entirely. Pet. App. A4. The onerous and restrictive nature of an injunction, which restricts an individual's freedom of speech, raises the importance of resolving this question of law to a new level and provides a sense of urgency that simply did not exist when this Court denied *certiorari* in *Fried*.

2. Moreover, the federal judicial landscape has become even more unsettled over whether constitutional defenses may be raised in FCC actions in federal district courts since this Court considered the *Fried* petition for *certiorari*. Additional decisions in the Sixth Circuit and the federal district of Connecticut have sharpened the split of authority and added to the confusion and uncertainty on this important issue of federal jurisdiction. In

the recent *United States v. Szoka*, 2001 U.S. App. LEXIS 16931 (6th Cir. July 30, 2001), the Sixth Circuit held that a microbroadcaster could not raise constitutional defenses against the FCC's motion for an injunction in district court where the FCC sought to enforce an already existing cease and desist order under 47 U.S.C. § 401(b).[1]

Contrary to the United States' contention, Opp. 2.b., *Szoka* does not in any way indicate that the Sixth Circuit is retreating from its position in *United States v. Any and All Radio Transmission Equipment* (*Strawcutter*), 204 F.3d 658 (2000), which held that a district court has jurisdiction to consider the constitutionality of FCC regulations when ruling on a forfeiture action. *Id.* at 667. *See Szoka*, 2001 U.S. App. LEXIS 16931 at *36 n.13 ("Our holding is not meant to cast any doubt on this court's prior holding in *Strawcutter*. We have discussed in detail the difference between the circumstances of this case . . . and those of *Strawcutter*."). *Szoka* does, however, highlight the uncertainty and unpredictability of this important area of the law. The *Szoka* court itself notes that *Neset* "runs contrary to [the Sixth Circuit's] decision in *Strawcutter*," *id.* at *34 n.11, and points out the further inconsistent results reached in *Fried, United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000); and *Prayze FM v. FCC*, 214, F.3d 245 (2d Cir. 2000) ("*Prayze I*"). *See Szoka*, 2001 U.S. App. LEXIS 16931 at *33-*35.

The split in judicial authority here is even further underscored and exacerbated by the recent ruling denying the FCC's summary judgment motion in *Prayze FM v. FCC*, No. 3:98cv529 (D. Ct. June 6, 2001) ("*Prayze II*") (included in the appendix to this brief as A-1-A-11). The *Prayze II* district court began its consideration of its

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[1] Importantly, the FCC did not issue a cease and desist order in the instant case. The United States simply filed an action for injunctive relief in district court, the forum in which Neset seeks to raise a constitutional defense.

jurisdiction to hear a defense challenging the constitutionality of FCC regulations by noting the circuit split in this area of the law evinced by *United States v. Any and All Radio Station Transmission Equip.* (*"Fried"*), 207 F.3d 458 (8th Cir. 2000), and *United States v. Any and All Radio Station Transmission Equip.* (*"Strawcutter"*), 204 F.3d 658 (6th Cir. 2000). *See Prayze II*, No. 3:98cv529 at 10-11; A-9-A-11.[2] The court went on to note the lack of "definitive controlling case law" on the subject, *Prayze II* No. 3:98cv529 at 11, A-10, before ultimately holding that it had jurisdiction as a district court to review defendant Prayze's constitutional challenges to the validity of FCC microbroadcasting regulations, which Prayze raised as a defense. *Id.*; A-10-A-11. The *Prayze II* decision, therefore, conflicts with this case and *Fried* and comes down on the side of *Strawcutter*.

These recent decisions display the futility of the United States' attempt to minimize the clear conflict that exists in this vital area where core constitutional rights are at stake. The new decisions both highlight and compound the need for this Court to resolve once and for all the question of whether federal district courts have jurisdiction to consider the constitutionality of FCC regulations as defenses to FCC actions initiated within those courts.

3. The United States' other miscellaneous arguments against this Court granting the Petition are equally unpersuasive. The United States contends that the resolution of the current disagreement over district court jurisdiction will not affect the ultimate outcome of the instant litigation, *see* Opp. 2.a. This is simply untrue. If Petitioner Neset had the opportunity to raise his constitutional defenses in the injunction action and succeeded in proving the unconstitutionality of the FCC regulations, the district court could not go on to enforce the very regulation it had declared an unconstitutional violation of his rights.

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[2] The *Prayze II* court refers to these decisions as *"Laurel Avenue"* and *"Maquina Musical"* respectively.

Clearly, the general requirement that a broadcaster be licensed does not violate the First Amendment, *see* Opp. 13, but unconstitutionally applied licensing requirements can in fact violate the First Amendment and, accordingly, form a proper basis for equitable relief.

To support its contrary position, the United States relies heavily on *Prayze I* where the court declined to resolve the jurisdictional question because it believed the FCC likely to prevail on the merits of the case. *See* Opp. 14 n.7; *Prayze I*, 214 F.3d at 251. However, as already discussed, the district court in the same case has since seen fit not only to resolve the jurisdictional issue, but also to resolve it in the defendant microbroadcaster's favor. *Prayze II*, No. 3:98cv529 at 11; A-10. This demonstrates that "the outcome on the merits of this sort of case" is not nearly so clear as the United States believes and certainly not clear enough to moot the question of the legality of district court jurisdiction. Opp. 14 n.7. The district court in *Prayze II* is permitting the microbroadcaster to proceed to the merits of its constitutional claim. Neset ultimately seeks to do the same thing upon remand to the district court.

The argument that the FCC's new low power rules may substantially reduce the future significance of this case, Opp. 16-17, is no more convincing. As the United States itself explains, under the current regulatory regime, no applicant that has *ever* engaged in any manner of unlicensed broadcasting is eligible for a low power FM license. Opp. 6-7; Radio Broadcasting Preservation Act of 2000, H.R. 5548, § 632. Therefore, an entire generation of microbroadcasters and low powered stations and their progeny continue to be flatly prohibited from low power broadcasting. Moreover, the new law simply does not impact ongoing litigation concerning microbroadcasters. And as the recent *Szoka* and *Prayze II* decisions from this year demonstrate, these cases continue to arise throughout the federal courts, with courts issuing conflicting rulings on an important question of federal jurisdiction.

Furthermore, because former microbroadcasters are explicitly prohibited from obtaining a license under the new law, microbroadcasters who engage in broadcasting, at least in several judicial circuits, will still be deprived of the ability to raise constitutional defenses in district court even when they are *defendants* in enforcement actions. The new law does not dissipate the need for resolution by this Court of, as the Eighth Circuit previously acknowledged, "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting" and a question on which there is no "precise precedent." *Fried*, 207 F.3d at 462.

CONCLUSION

The United States' arguments have only served to highlight the need for this Court to resolve the crucial issues presented in this case. Petitioner Neset therefore respectfully urges this Court to grant the Petition.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PRAYZE FM a/k/a INCOM, LLC, MARK BLAKE, and LORETTA SPIVEY, Plaintiffs,	:	3:98cv375 (WWE)
v.	:	
UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION, Defendant	:	

UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION,	:	3:98cv529 (WWE)
v.	:	
PRAYZE FM a/k/a INCOM, LLC, MARK BLAKE, and LORETTA SPIVEY, Defendants	:	

RULING ON PLAINTIFF UNITED STATES OF AMERICA / FEDERAL COMMUNICATION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

This case arises from the actions of the defendants,[1] Prayze FM a/k/a Incom, L.L.C., Mark Blake, and Loretta Spivey ("Prayze"), in broadcasting from a low power FM radio station without a license. With the permission of this Court, Prayze has filed a second amended complaint [doc. # 116] upon which this ruling will be based. The amended complaint alleges that Federal Communications Commission ("FCC") regulations regarding microradio broadcasting, as modified by the Radio Broadcasting Preservation Act of 2000, (1) violate the First and Fourteenth Amendments to the Constitution of the United States, both facially and as-applied, because the requirement of minimum distance separations between new LPFM stations and full power FM radio stations on third-adjacent channels is not narrowly tailored to serve the substantial government interest in protecting full power FM radio stations from signal interference within their protected contours, or in any other substantial governmental interest [Count One]; (2) violate the plaintiffs' First Amendment rights, facially and as-applied, because the automatic and permanent disqualification of any LPFM applicant previously engaged in unlicensed broadcasting

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[1] Prayze FM is the plaintiff in the original complaint which sought to enjoin the FCC from shutting down the radio station broadcasts. The FCC subsequently filed a motion for injunctive relief against Prayze FM, and the cases were consolidated by this Court's order dated 5/12/98.

is not narrowly tailored to serve the substantial governmental interest in ensuring that broadcast licensees are truthful and reliable [Count Two]; (3) violate the First and Fourteenth Amendments of the Constitution, both facially and as-applied, because it denies LPFM applicants that have previously engaged in unlicensed broadcasting the same opportunity afforded other broadcast license applicants that have previously engaged in serious misconduct, including FCC-related misconduct, to present mitigating evidence and demonstrate that they can operate a broadcast station in the public interest with no likelihood of future misconduct [Count Three]; and (4) violate the plaintiffs' First Amendment rights by attempting to punish a particular viewpoint by automatically and permanently disqualifying unlicensed microbroadcasters from obtaining LPFM licenses [Count Four]. In this count, the plaintiffs claim that Congress has singled out one class of broadcast license applicants for an especially harsh sanction, one not imposed on other broadcast license applicants that have previously engaged in other equally, if not more serious, types of FCC and non-FCC related conduct, because this class of unlicensed broadcasters espoused that civil disobedience was an appropriate course of action, given the refusal of the FCC to repeal what the microbroadcasters viewed in the 1990s as an ill-conceived, outmoded, and unconstitutional ban on low power FM broadcasting. The plaintiffs allege that this attempt by Congress to punish a particular viewpoint violates the First Amendment to the United States Constitution.

The FCC asserts that there are no genuine issues of material fact in dispute, and that the district court is not

the proper forum for a decision in this case, in that the court of appeals has exclusive jurisdiction to review the validity of FCC regulations under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. Now pending before the Court is the plaintiff FCC's motion for summary judgment [doc. # 100]. For the reasons stated below, the FCC's motion will be denied.

DISCUSSION

Background

The parties have submitted Local 9(c) Statements and evidentiary submissions that represent the following undisputed facts. In December, 1996, the Field Office of the Compliance and Information Bureau of the FCC in Boston, Massachusetts, began an investigation into the existence of a possible unlicensed FM radio station transmitting from the Bloomfield, Connecticut, area. Alerted from newspaper clippings, telephone calls and written correspondence, the FCC discovered a transmission on the frequency 105.3 megahertz (MHZ) identifying itself as Prayze FM and WPRZ. As of December 1996, the FCC had not authorized any radio station to operate in the Bloomfield, Connecticut, area with the call sign WPRZ on 103.5 MHZ.

On March 4, 1997, an FCC engineer located the signal source of the radio transmission to be in the vicinity of 701 Cottage Grove Road, Bloomfield, Connecticut. Articles in the Hartford Courant reported that the radio station at that location, identified as Prayze FM, was being operated by the defendant Mark Blake. On March 19,

1997, the FCC was informed that Prayze FM's transmission was causing interference with one licensed station's signal, and was having a negative economic impact on another licensed station. On various occasions, an FCC engineer made field strength measurements of the station's signal, and found that the measured signal exceeded FCC rules regulating low power radio stations by 600 to 1000 times the maximum signal strength allowed.

On November 2, 1999, this Court granted the FCC's motion for a preliminary injunction, enjoining Prayze FM from making radio transmissions within the United States until Prayze obtained a license from the FCC. The Second Circuit affirmed this Court's ruling on June 5, 2000. *Prayze FM v. Federal Communications Commission*, 214 F.3d 245 (2d Cir. 2000).

Since the date of the Court's ruling on the FCC's motion for preliminary injunction, the FCC has drastically changed its policy regarding microbroadcasting by amending its regulations to allow the licensing of low-power radio stations ("LPFM"). On January 20, 2000, the FCC promulgated regulations creating two new classes of low-power radio stations with power levels of 10 and 100 watts, to be operated on a noncommercial basis only, for the purpose of promoting diversity and localism in radio broadcasts. Unlicensed microbroadcasters were allowed to obtain new licenses only if they certified that they either (1) voluntarily ceased unlicensed broadcasting no later than February 26, 1999, without being specifically told to by the FCC; or (2) ceased unlicensed broadcasting within 24 hours of being told to do so by the FCC. These requirements were waivable if good cause was shown.

On or about August 29, 2000, defendant Mark Blake applied for a license to broadcast under the new corporate name, Good News Broadcasting, LLC ("Good News"), requesting a waiver of the FCC's rules disqualifying those applicants who continued to operate unlicensed radio stations after February 26, 1999, or after being warned by the FCC to shut down.

On December 15, 2000, Congress enacted the Radio Broadcasting Preservation Act of 2000, further muddying the waters regarding the rules for low power FM radio service by severely limiting, perhaps eviscerating, the FCC's January, 2000, regulations allowing the development and licensing of noncommercial microradio stations. The Act directed the FCC to modify its rules to prescribe minimum distance separations between new LPFM stations and full power FM radio stations on third-adjacent channels (an action the FCC previously determined was unnecessary), barred the FCC from eliminating third-adjacent channel protection from LPFM stations without prior Congressional approval, and directed the FCC to amend its LPFM rules to prohibit all applicants who had previously engaged in unlicensed broadcast operations from becoming LPFM licensees.

Standard of Review for Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and its is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not

differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson*, 477 U.S. at 249.

In its motion for summary judgment, the FCC asserts that there have been no material changes in circumstances, that there are no factual disputes between the parties, and that the legal dispute has effectively been decided in favor of the government in view of this Court's decision to enter injunctive relief, as well as by the Second Circuit's decision in *Free Speech v. Reno*, 200 F.3d 63 (1999) (affirming the district court's granting of a preliminary injunction against an unlicensed low power radio station operator who challenged the constitutionality of microbroadcasting regulations).

Prayze opposes the motion for summary judgment on the grounds that the legal dispute has not been

resolved in favor of the government, and that the government is wrong in asserting that no material changes in circumstances have occurred since Prayze ceased broadcasting. Specifically, Prayze argues that it is entitled to make a facial constitutional challenge to the FCC regulations in this action. Prayze also asserts that it may make an as-applied challenge to the statute since the application and waiver request are an exercise in futility after the passage of the Radio Broadcasting Preservation Act of 2000.

At the time of the Second Circuit's decision in *Prayze FM*, 214 F.3d at 251, Prayze had not applied for a conventional FCC license to broadcast and a waiver of the regulations (that on their face would prohibit it from obtaining such a license). The Second Circuit was clear in its holding that although Prayze did not yet have standing to raise its as-applied challenge, it did have standing to bring a facial challenge to the FCC regulations.

If, as Prayze asserts, its efforts in applying for a license and waiver are futile, Prayze would have standing to bring its as-applied challenge to the regulations.

The Radio Broadcasting Preservation Act of 2000, H.R. 5548, § 6329a), which was signed into law on December 21, 2000, states in pertinent part that

> (1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25, to –
>
> (A) prescribe minimum distance separations for third-adjacent channels (as well as for co-

channels and first- and second adjacent channels); and

(B) prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 U.S.C. 301).

This Court agrees with Prayze's assertions regarding futility, and finds that the Act expressly excludes Prayze FM or its progeny from obtaining a low power Fm license. If the FCC issued a license to Good News, based on the application filed by Mark Blake, it would be in violation of the Radio Broadcasting Preservation Act of 2000. This Court finds futility, and consequently finds standing on the as-applied challenge.

This Court adheres to the Second Circuit's ruling, finding standing on the facial challenge, and finds that there are genuine issues of material fact in dispute. The motion for summary judgment will be denied.

JURISDICTION

The FCC also raises the issue of jurisdiction, claiming that 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 confine the review of the validity of FCC regulations to the court of appeals, not the district courts. Prayze asserts that this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1346(2).

Section 2342 of Title 28 states, in pertinent part, that the Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Federal Communications Commission made

reviewable by 47 U.S.C. § 402(a); § 1331 states that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. The Second Circuit addressed the question of district court jurisdiction in considering the constitutionality of FCC regulations, and found that the issue was unclear. *Prayze FM*, 214 F.3d at 250. The Eighth Circuit ruled that district courts were barred from hearing constitutional challenges to FCC regulations, *United States v. Any and All Radio Station Transmission Equip.* ("Laurel Avenue"), 207 F.3d 458, 463 (8th Cir. 2000), while the Sixth Circuit came to the opposite conclusion, reasoning it was unlikely that Congress intended to deprive defendants in forfeiture actions of the ability to raise constitutional defenses to those actions. *United States v. Any and All Radio Station Transmission Equip. ("Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000).

In resolving this issue without any definitive controlling case law, this Court will rely on the plain language of 28 U.S.C. § 1331, and hold that the present case is a civil action arising under the Constitution of the United States, and as such the district court has original jurisdiction. Had the Congress intended for the court of appeals to determine the constitutionality of all final orders of the FCC, this Court presumes Congress would have added that specific language to the other actions falling under the exclusive jurisdiction of the court of appeals in 28 U.S.C. § 2342.

CONCLUSION

For the reasons set forth above, the plaintiff FCC's motion for summary judgment [doc. # 100] is DENIED on all counts, and this Court retains jurisdiction over the case pursuant to 28 U.S.C. § 1331.

SO ORDERED on this 6th day of June, 2001, at Bridgeport, Connecticut.

/s/ Warren W. Eginton
Warren W. Eginton, Senior
U.S. District Judge